

10 May 1988
OCA 88-1472

NOTE FOR: The General Counsel
The Comptroller

STAT

FROM:

Office of Congressional Affairs

SUBJECT: House Intelligence Oversight Bill

Attached is the latest and final draft of a letter from NSC to Mike O'Neil on the Intelligence Oversight Bill, which will be marked up tomorrow by the HPSCI. The letter has been expanded to comment on all the proposed amendments to H.R. 3822. The letter attaches a "Statement of Understanding" regarding the definition of Covert Action. The Statement of Understanding is similar to previous draft letters on this subject. O'Neil has reviewed this Statement of Understanding and surprisingly is comfortable with it.

You should also note that O'Neil has agreed to exclude "traditional counterintelligence activities" as opposed to "routine counterintelligence activities" from the definition of covert action.

Because the letter is now commenting on all the proposed amendments to H.R. 3822, I believe it would be a good idea to note in the letter that the proposed language on the reporting of non-appropriated funds is acceptable on the condition that we can reach an agreement with the HPSCI staff on the circumstances under which the Agency must report the use of those funds to Congress. We should know in the next few weeks whether such an agreement is possible.

It is necessary to respond to NSC no latter than 3:30 today with our comments on the letter.

Dear Mr. O'Neil:

We appreciate the opportunity to work with the Committee in the effort to address certain technical issues raised by the language of H.R. 3822, the Intelligence Oversight Act of 1988, as introduced in the House of Representatives. We have reviewed the proposed amendments provided to us by Committee staff on May 9. These amendments as drafted address in an acceptable way certain technical problems in the original language of H.R. 3822 about which agencies expressed concern. The proposed amendments do not, of course, resolve objections to the proposed Act's provision regarding the forty-eight-hour reporting requirement for all covert action Findings, a problem that was outside the scope of our work on the technical issues presented by the proposed Act.

In working with the Committee staff, the effort to reach agreement about an improved definition of "covert action" for incorporation into the proposed Act has been especially important. This effort has helped to clarify the understanding about what is meant by covert action. While experience over time has produced mutual understanding as to what constitutes covert action, ambiguities in existing law, which the Iran-Contra matter so painfully revealed, have created misunderstandings and tension that both the Executive and Legislative Branches are determined to avoid in the future. We consider the proposed definition of covert action, as we understand it, a distinct improvement over the provisions of existing law. Our understanding of the proposed definition is explained in the attached Statement.

In summary, the language used in the definition as well as the process by which it was developed, should go a long way toward preventing misunderstandings in the future.

I am providing a copy of this letter and attachment to Mr. Steven Nelson.

Sincerely,

Attachment: Statement

5/9/88

4:30 p.m.

DEFINITION OF COVERT ACTION

Statement of Understanding

Focusing on the draft definition of covert action furnished on April 19, 1988, this letter sets forth our understanding of the Committee's intent as well as our views about particular language. We do this in the context of our understanding that the Committee's goals are: (1) to reach agreement between the two branches as to what constitutes covert action; (2) to ensure that covert action receives presidential approval and is reported to Congress whenever it is undertaken by any Executive Branch entity; (3) to ensure that procedures for reporting covert action will encompass those significant operations without trivializing the Finding process by requiring presidential action for diplomatic, counterintelligence, security, military, law enforcement or other activities that fall within the standing authorities and missions of Executive Branch departments, agencies, and entities, that have not, in the past, been understood by both branches to be covert actions.

In light of this understanding, we take it that the reference to influencing "political, economic, or military conditions abroad" is intended to encompass significant covert operations of the type currently covered by the definition of "special activities" in Executive Order No. 12333 in the context of intelligence agency missions and capabilities. We do not read the language as including, for example, military denial and deception operations designed to protect our own armed forces unless they clearly have more than an incidental impact on military "conditions" abroad. Traditional international activities of the Treasury Department are also not considered included.

Similarly, we read the language regarding a U.S. role that is "not intended to be apparent or acknowledged publicly" as distinguishing between operations, which, while conducted secretly for security reasons at the initial stage, ultimately will be acknowledged and those which the United States has no intention of ever acknowledging. Thus, we would not view military special operations (preliminary reconnaissance for a Grenada rescue mission, for example) even though conducted secretly, as a covert action because the ultimate intent is to

carry out a public operation. In our discussions with staff it was agreed that "clandestine" and "covert" are not synonymous and that secret preparations for activities that are ultimately acknowledged or for which the U.S. Government has no intention of denying responsibility, do not constitute "covert actions."

The various exceptions contained in the proposed definition, in our view, are crucial and reinforce this distinction between "clandestine" and "covert." Further, the exceptions outlined are critical to a definition of covert action that correctly matches the real scope of the term. The risk inherent in giving new form to well understood concepts is that we might inadvertently leave open to argument the question of whether the scope of the definition actually has been changed.

The first exception, for example, clearly excludes clandestine intelligence gathering from the definition of covert action. It also excludes traditional counterintelligence activities and traditional operational security activities. We agree with these exclusions.

The reference to "operational security" will help ensure understanding that certain security activities, which might fall within a broad description of covert action, are excluded from the definition of covert action in this Bill. "Operational security," a term of art in the military, involves, but is not limited to, measures including camouflage, concealment, cover, and deception. Making clear that such security measures, together with other elements of security programs to protect U.S. programs, are excluded from the intelligence activities covered by the Bill will avoid ambiguity.

The second exclusion incorporates the concept of Executive Order No. 12333 that diplomatic initiatives are outside the scope of covert action even if conducted secretly. Likewise, it makes clear that "traditional" military activities, which have not in the past been considered covert action, will not be included in the new definition merely because the preamble refers to influencing "military conditions abroad." Again, we do not believe that use of the term "traditional" should be construed to mean that there must be an exact precedent for every aspect of these activities. It is also helpful that the exclusion makes it clear that routine support for these diplomatic and military activities is not covert action. In this regard, we note with approval the assurance, stated in the SSCI Report on S. 1721, that the revised definition in the Senate Bill is crafted so as to reflect existing law and not to disturb the body of legal interpretation under current legal requirements, as well as the oral statement of Subcommittee Chairman McHugh to Secretary Carlucci on March 10, 1988, that H.R. 3822 does not encompass traditional military activities.

The third exclusion makes it clear that even though the covert action definition is expanded to cover activities by all elements of the U.S. Government, this expansion is not intended to encompass "traditional" law enforcement activities conducted under cover. Similarly, it specifies that routine support to such activities, even if provided by intelligence agencies, does not require a Finding.

Finally, the fourth exclusion makes it clear that clandestine, non-covert support services do not require a Finding if the underlying operation itself does not require a Finding. Thus, it shifts the focus to the nature of the undertaking being supported rather than the nature of the agency providing support. This clarification should prove particularly helpful in eliminating ambiguities in situations where several agencies are involved in an operation, not in itself covert, but involving clandestine, non-covert support services.

No definition can anticipate every circumstance that may arise. Experience gives rise to common understandings, practices, and procedures. Since the establishment of the Central Intelligence Agency and congressional intelligence committees, the Executive and Legislative Branches have achieved an understanding of what a covert action is recognizing that "covert action" is synonymous with "special activities," to be operations designed to influence foreign governments, events, organizations or persons in support of U.S. foreign policy objectives abroad, whose sponsorship or conduct by the U.S. Government is officially deniable, notwithstanding the disclosure of the activities during or after their execution. This understanding traditionally has meant covert propaganda, covert paramilitary, covert economic and covert political actions or influence operations abroad. Since 1974, these operations have required a Presidential Finding for their authorization. It has also been understood that support by an Executive Department or Agency, including DoD, to the conduct of a covert action by the CIA or another Executive Department or Agency, pursuant to a presidential Finding does not constitute, in itself, a separate covert action. This is the traditional understanding of covert action on which the Executive Branch consistently has operated since the establishment of the requirement to report such activities to Congress; and we interpret your proposed definition of covert action to be consistent with this understanding.

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20505

May 10, 1988

Attached is the package on the definition of covert action we propose Barry Kelly will send to Mike O'Neil before the markup on Wednesday, May 11. The new package reflects the outcome of a discussion we had with HPSCI staff May 9. You will note that the letter to O'Neil incorporates the first two paragraphs and the last paragraph of the letter you have previously worked. The statement contains the bulk of the remainder of the text as previously agreed. Jim Collins will call you to note where minor revisions have been made in the statement.

Last evening, May 9, HPSCI staff provided an updated version of the proposed staff amendments to H.R. 3822. The new draft is also attached. (Note that in the definition of covert action, the reference to the exclusion of counterintelligence activities now refers to "traditional" vice routine.

HPSCI

May 9, 1988

AMENDMENTS TO H.R. 3822

1. Page 1, line 5, delete "1987" and insert in lieu thereof "1988". Page 3, line 23, delete the comma after "methods" and insert in lieu thereof "or other exceptionally sensitive matters,". Page 6, line 11, delete the comma after "methods" and insert in lieu thereof "or other exceptionally sensitive matters,".
2. On page 3, line 20, delete "(a)". Page 3, line 26, insert "(1)" before "keep". Page 4, line 6, strike the period and insert in lieu thereof "; and". Page 4, line 7, strike everything through "shall" on line 10, and insert in lieu thereof "(2)".
3. On page 4, line 17, strike "The" and all that follows through "when" on line 19 and insert in lieu thereof "The President may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government unless".
4. On page 4, line 20, strike "the" and insert in lieu thereof "identifiable".
5. Page 5, lines 21-22, delete "in consultation with the Director of Central Intelligence,".
6. On page 8, line 14, strike everything through the period on page 9, line 1 and insert in lieu thereof

"(e) The term 'covert action' means an activity or activities conducted by an element of the United States Government to influence political, economic, or military conditions abroad so that the role of the United States Government is not intended to be apparent or acknowledged publicly, but does not include—

"(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

"(2) traditional diplomatic or military activities or routine support to such activities;

"(3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or

"(4) activities to provide routine support to the overt activities (other than activities described in paragraphs (1), (2), or (3)) of other United States Government agencies abroad."

7. Strike "special activity" and "special activities" wherever they occur and insert in lieu thereof respectively "covert action" and "covert actions". Page 4, line 20 and page 7, line 21, strike "activity" and insert in lieu thereof "action". Page 5, lines 8 and 13, strike "activities" and insert in lieu thereof "actions". Page 8, line 11, strike "funding" and insert in lieu thereof "finding". Page 9, line 2, strike "country" and insert in lieu thereof "government".
8. Page 9, line 11, strike the comma and all that follows through the comma on line 13. Page 9, line 14, strike "new subsection (d)". Page 9, line 21, strike the quotation marks and insert after line 21 the following:

"(e) Except as provided in Section 204(b) (appearing under the heading 'General Provisions—Department of Justice') of the Department of Justice Appropriations Act, 1988 (contained in P.L. 100-202) and in Section 423 of Title 10, United States Code, funds available to an intelligence agency which are not appropriated funds may be obligated or expended for an intelligence or intelligence-related activity only if they are used for activities reported to the appropriate congressional committees pursuant to procedures jointly agreed upon by such committees, the Director of Central Intelligence or the Secretary of Defense, which identify types of activities for which nonappropriated funds may be expended and under what circumstances an activity must be reported as a significant anticipated intelligence activity before such funds can be expended."

9. On page 10, line 1, insert "the anticipated transfer in any fiscal year of" before "any".